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DEPARTMENT OF AGRICULTURE

Animal and Plant Health Inspection Service

7 CFR Part 357

[Docket No. APHIS-2018-0017]

RIN 0579-AE36

Lacey Act Implementation Plan: Composite Plant Materials

AGENCY: Animal and Plant Health Inspection Service, USDA.

ACTION: Advance notice of proposed rulemaking and request for comments.

SUMMARY: The Food, Conservation and Energy Act of 2008 amended the Lacey Act to provide, among other things, that importers submit a declaration at the time of importation for certain plants and plant products. The declaration requirements of the Lacey Act became effective on December 15, 2008, and enforcement of those requirements is being phased in. We are soliciting public comment on regulatory options that could address certain issues that have arisen with the implementation of the declaration requirement for composite plant materials.

DATES: We will consider all comments that we receive on or before [Insert date 60 days after date of publication in the Federal Register].

ADDRESSES: You may submit comments by either of the following methods:

- Federal eRulemaking Portal: Go to

<http://www.regulations.gov/#!docketDetail;D=APHIS-2018-0017>.

- Postal Mail/Commercial Delivery: Send your comment to Docket No. APHIS-2018-0017, Regulatory Analysis and Development, PPD, APHIS, Station 3A-03.8, 4700 River Road Unit 118, Riverdale, MD 20737-1238.

Supporting documents and any comments we receive on this docket may be viewed at <http://www.regulations.gov/#!docketDetail;D=APHIS-2018-0017> or in our reading room, which is located in room 1141 of the USDA South Building, 14th Street and Independence Avenue SW., Washington, DC. Normal reading room hours are 8 a.m. to 4:30 p.m., Monday through Friday, except holidays. To be sure someone is there to help you, please call (202) 799-7039 before coming.

FOR FURTHER INFORMATION CONTACT: Ms. Parul Patel, Senior Agriculturalist, Permitting and Compliance Coordination, PPQ, APHIS, 4700 River Road Unit 60, Riverdale, MD 20737-1231; (301) 851-2351.

SUPPLEMENTARY INFORMATION:

Background

The Lacey Act (16 U.S.C. 3371 *et seq.*), first enacted in 1900 and significantly amended in 1981, is the United States' oldest wildlife protection statute. The Act combats, among other things, trafficking in illegally taken wildlife, fish, or plants. The Food, Conservation and Energy Act of 2008, effective May 22, 2008, amended the Lacey Act by expanding its protection to a broader range of plants and plant products than were previously covered. (Section 8204, Prevention of Illegal Logging Practices). The Lacey Act now makes it unlawful to import, export, transport, sell, receive, acquire, or purchase in interstate or foreign commerce any plant, with some limited exceptions, taken, possessed, transported, or sold in violation of any law of the United States or an Indian tribe, or in violation of any State or foreign law that protects plants or

that regulates certain specified plant-related activities. The Lacey Act also now makes it unlawful to make or submit any false record, account, or label for, or any false identification of, any plant.

In addition, Section 3 of the Lacey Act, as amended, makes it unlawful, as of December 15, 2008, to import certain plants, including plant products, without an import declaration. The import declaration serves as a tool for combatting the illegal trade in timber and timber products by ensuring importers provide required information. Through the declaration requirement, the importer maintains accountability for exercising reasonable care regarding the content of the shipment before it arrives in the United States. Information from the declaration is also used to monitor implementation of Lacey Act requirements. The declaration must contain the scientific name of the plant, value of the importation, quantity of the plant, and name of the country from which the plant was harvested.

On June 30, 2011, the Animal and Plant Health Inspection Service (APHIS) published an advance notice of proposed rulemaking (ANPR) in the *Federal Register* (76 FR 38330, Docket No. APHIS-2010-0129),¹ soliciting public comment on several regulatory options to address certain issues that have arisen with the implementation of the declaration requirement. These options included establishing certain exceptions to the declaration requirement. We solicited comments on these options for 60 days ending on August 29, 2011, and received 37 comments by that date. The comments received were from academics, environmental groups, importers and exporters, industry associations, a trade union, representatives of foreign governments, and private citizens.

¹ To view the advance notice of proposed rulemaking and the comments we received, go to <http://www.regulations.gov/#!docketDetail;D=APHIS-2010-0129>.

The first regulatory option we discussed in the 2011 ANPR was the possibility of establishing a limited exception to the plant declaration requirement for imported products containing minimal amounts of plant material. The Lacey Act does not explicitly address whether the declaration requirement is intended to apply to such products, but it is questionable whether the regulatory objectives of the Lacey Act are furthered by applying this requirement to minimal amounts of non-listed (i.e., not of conservation concern) plant materials contained in an otherwise non-plant product. In a separate document published today in the *Federal Register*, we are proposing to establish an exception to the Lacey Act plant declaration requirement for such products.

This notice addresses the second regulatory option that was discussed in the 2011 ANPR that related to a separate de minimis exception that related to composite plant products. This exception would cover composite plant materials that are not otherwise considered de minimis quantities under the first regulatory option. Many composite plant materials are currently manufactured in a manner that makes identification of the genus, species, and country of harvest of all of the plant content difficult and perhaps expensive. While provisions in the Lacey Act's declaration requirement address how to complete a declaration in situations in which the species or country of harvest of plant material used in an imported product varies (16 U.S.C. 3372(f)(2)(A) and (B)), these provisions may not relieve the difficulties and expense faced by importers of some composite plant materials. In the 2011 ANPR, we solicited comments on defining the term *composite plant materials* and on two possible approaches to incorporating such a definition into a separate de minimis exception from the declaration requirement specifically for such composite plant materials.

Specifically, we invited comment on the possibility of defining *composite plant materials* as plant products and plant-based components of products where the original plant material is mechanically or chemically broken down and subsequently re-composed or used as an extract in a manufacturing process. Such a definition would need to be broad enough to include various complex composite materials (e.g., pulp, paper, paperboard, medium density fiberboard, high density fiberboard, and particleboard), and also need to include exceptions for species listed in an appendix to the Convention on International Trade in Endangered Species; as an endangered or threatened species under the Endangered Species Act of 1973; or pursuant to any State law that provides for the conservation of species that are indigenous to the State and are threatened with extinction.

Of the 37 commenters on the ANPR, 16 specifically addressed the potential approaches for composite plant materials. Most of those commenters supported defining the term *composite plant materials* because such a definition would provide additional guidance to importers. Several commenters requested that the definition be written in a way to exclude certain products, such as plant-derived perfume components and seaweed products. One commenter expressed concern that, under the definition we suggested in the ANPR, any wood product other than a log or piece of sawn timber that has not been subsequently attached somehow to other wood material could be defined as composite. Another commenter opposed the definition as contrary to the spirit and letter of the Lacey Act but did not address any specific aspects of the definition.

We also invited comments on two possible approaches to incorporating such a definition into a de minimis exception from the declaration requirement for composite plant materials. In the first approach, if the plant product being imported is composed in whole or in part of a composite plant material, importers would be exempted from identifying the genus, species, and

country of harvest of up to a given percentage of the composite plant material content, measured on the basis of either weight or volume.

In the second approach, where the plant product being imported is composed in whole or in part of a composite plant material, the declaration would have to contain the average percent composite plant content, measured on the basis of either weight or volume, without regard for the species or country of harvest of the plant, in addition to information as to genus, species, and country of harvest for any non-composite plant content.

Many of the commenters preferred the second approach to incorporating the definition into a de minimis exception to the plant declaration as the easiest to implement and least burdensome on importers. However, two commenters opposed omitting species and harvest location from the declaration for composite plant materials because they believed that omission would permanently exclude those products from the declaration requirement and would therefore be contrary to the intent of the Lacey Act. One of these commenters stated that while small amounts of diverse plant material may enter production streams unknowingly, the bulk of wood fiber used to make fiberboard, medium-density fiberboard, high-density fiberboard, and similar materials is purposefully processed into wood chips with the direct intent of producing a composite product. The commenter further stated that in order for this process to be economically feasible, the majority of the raw materials are sourced within close proximity of the mill or plant. The commenter stated that this practice greatly limits the number of species that could be included in the product.

We have decided to publish another ANPR to solicit comments addressing the following questions:

- Is the scope of the proposed definition for *composite plant materials* appropriate, and if not, how could it be revised?
- What would be an appropriate threshold for a de minimis exception from the declaration requirement for composite plant materials under the first approach identified above? We especially invite comment on the feasibility of providing importers an exemption from identifying in a declaration the genus, species, and country of harvest for up to 5 percent of the composite plant material in a product being imported so long as it does not include material from plants of conservation concern that are listed in an appendix to the Convention on International Trade in Endangered Species; as an endangered or threatened species under the Endangered Species Act of 1973; or pursuant to any State law that provides for the conservation of species that are indigenous to the State and are threatened with extinction. We also invite comment on whether that percentage should be higher or lower, and why. Additional data on why commenters support either the 5 percent threshold or an alternative threshold would be useful for the rulemaking process. We note that where a paper or paperboard plant product includes recycled plant product the statute only requires that the importer identify an average percent of recycled content without regard for the species or country of harvest of a recycled product, in addition to the information otherwise required for the non-recycled plant content.
- Would the second approach discussed above, in which the declaration would have to contain the average percent composite plant content, measured on the basis of either weight or volume (in addition to information as to genus, species, and country of harvest for any non-composite plant content) be appropriate as a de minimis exception to the Lacey Act declaration requirement and consistent with the statute? Would such an

approach affect U.S. manufacturers who export finished products to Europe and other market nations that may require their traders to authenticate the source of wood or wood products?

- Would an alternative approach to either of those described above concerning the import declaration requirement be appropriate in the case of composite products, and why?
- What specific activities would affected entities (including importers and their suppliers) need to engage in in order to identify the species and country of harvest of plants in composite plant materials and thereby comply with the declaration requirement for products containing such plant materials?
- How would those specific activities be affected by various levels of a de minimis exception to the declaration requirement products containing composite plant materials?
- In commenting on any of the approaches described above or proposing an alternative threshold, comments should take into consideration that a de minimis exception to a statutory requirement is being proposed, which means that the exception should be appropriately limited and consistent with the statute.

This action has been determined to be significant for the purposes of Executive Order 12866 and, therefore, has been reviewed by the Office of Management and Budget.

Authority: 16 U.S.C. 3371 *et seq.*; 7 CFR 2.22, 2.80, and 371.2(d).

Done in Washington, DC, this 3rd day of July 2018 .

Greg Ibach

Under Secretary for Marketing and Regulatory Programs.
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